Perkayuan OKS No 2 Sdn Bhd v Kelantan State Economic Development Corp

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-117 OF 1994
EUSOFF CHIN CHIEF JUSTICE, CHONG SIEW FAI AND LAMIN FCJJ
24 FEBRUARY 1995

Contract *— Assignment — Privity — Prohibition against assignment of contract without consent — Change of name of one party — Whether there was assignment requiring consent*

Contract *— Assignment — Intention of parties — Prohibition against assignment of contract without consent — Whether logging contract assigned or merely sub-contracted to third party — Whether consent required — Test to be applied*

Contract *— Termination — Notice of termination — Whether must contain particulars of breach — Whether notice valid if allegations of breach vague — Whether misrepresentation during course of contract entitled other party to terminate*

The appellant and the respondent entered into an agreement ('the main agreement') whereby the appellant, formerly known as Perkayuan OTP Sdn Bhd, was allowed to carry out logging in a timber concession of 40,000 acres of forest land. Under cl 18 of the main agreement, the appellant could not assign, lease, sublet or transfer its rights without first obtaining the written consent of the respondent. By another agreement ('the second agreement'), between the appellant and Sykt Kempadang Bersatu Sdn Bhd ('Kempadang'), the appellant engaged Kempadang as a contractor 'to fell logs and remove timber from the contract area' subject to the terms and conditions therein contained. The respondent terminated the main agreement after its solicitors served a notice on the appellant alleging that the appellant had breached the main agreement by: (i) assigning the main agreement to OKS No 2 without the respondent's written consent in breach of cl 18; (ii) leasing, subletting and/or transferring the appellant's rights under the main agreement to third parties on various occasions without the respondent's written consent in breach of cl 18; (iii) misrepresenting to the Menteri Besar of Kelantan that the second agreement had been cancelled; and (iv) having a subsisting agreement with Kempadang, giving away the appellant's rights under the main agreement without the respondent's written consent. The trial judge held, inter alia, that the second agreement was an assignment to Kempadang in breach of the main agreement and therefore the respondent's termination was valid. The appellant appealed.

Held, allowing the appeal:

(1) The appellant's change of name did not affect the entity of the company in the face of s 23(6) of the Companies Act 1965 and

the certificate of incorporation on change of name of company issued by the registrar of companies. There was therefore no breach of cl 18 of the main agreement.

(2) The notice was inadequate as the particulars set out were unspecific, ambiguous and vague. The allegation that the appellant had assigned its rights under the main agreement to third parties on 'various occasions' lacked details on the identity of the third parties. The allegations must be sufficiently particularized to enable the appellant to admit or deny them. Such a vague notice was no notice in law.

(3) There was no provision in the main agreement requiring the parties to keep the Menteri Besar informed of the progress of the logging activities. Therefore, any misrepresentation by a party to the Menteri Besar would not entitle the other party to terminate the main agreement. In any event, there was no evidence of misrepresentation by the appellant. There was no provision in the main agreement requiring the parties to keep the Menteri Besar informed of the progress of the logging activities. Therefore, any misrepresentation by a party to the Menteri Besar would not entitle the other party to terminate the main agreement. In any event, there was no evidence of misrepresentation by the appellant to the Menteri Besar and the notice did not state how the misrepresentation came about or what had been misrepresented.

(4) Under the second agreement, the appellant had engaged Kempadang to fell the timber in conformity with its directions and the security deposit under the main agreement remained in the appellant's name, implying that the logging was to continue under the main agreement. Furthermore, by cl 12 of the second agreement, the second agreement would subsist for so long as the main agreement remained in force. These indicated that the second agreement was not an assignment but was in fact a sub-contract. Therefore, it did not breach cl 18.

[Bahasa Malaysia summary

Perayu dan responden telah mengikat suatu perjanjian ('perjanjian utama itu') di mana perayu, sebelum ini dikenali sebagai Perkayuan OTP Sdn Bhd, dibenarkan menjalani pembalakan di satu konsesi balak seluas 40,000 ekar tanah hutan. Di bawah fasal 18 perjanjian utama itu, perayu tidak boleh menyerahhak, memajak, menyewa atau memindahmilik haknya tanpa memperolehi persetujuan bertulis responden. Melalui suatu perjanjian lain ('perjanjian kedua'), di antara perayu dan Sykt Kempadang Bersatu Sdn Bhd ('Kempadang'), perayu telah menggaji Kempadang sebagai kontraktor 'untuk menebang dan mengalih balak dari kawasan kontrak' tertakluk kepada terma dan syarat yang terkandung di dalamnya. Responden telah menamatkan perjanjian utama itu setelah peguamcaranya menyampaikan suatu notis ke atas perayu mengatakan bahawa perayu

telah memungkiri perjanjian utama itu dengan: (i) menyerahhak perjanjian utama itu kepada OKS No 2 tanpa kebenaran bertulis responden yang melanggar fasal 18; (ii) memajak, menyewa dan/atau memindahmilik hak perayu di bawah perjanjian utama itu kepada pihak ketiga beberapa kali tanpa kebenaran bertulis responden yang melanggar fasal 18; (iii) melakukan salah nyata kepada Menteri Besar Kelantan bahawa perjanjian kedua telah dibatalkan; dan (iv) mengadakan perjanjian yang masih wujud dengan Kempadang, memberikan hak perayu di bawah perjanjian utama itu tanpa kebenaran bertulis responden. Hakim perbicaraan memutuskan, antara lain, bahawa perjanjian kedua itu adalah satu penyerahhakan kepada Kempadang yang memungkiri perjanjian utama itu dan, dengan itu, penamatan oleh responden adalah sah. Perayu membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Penukaran nama perayu tidak menjejaskan entiti syarikat itu memandangkan s 23(6) Akta Syarikat 1965 dan sijil pemerbadanan atas penukaran nama syarikat yang telah dikeluarkan oleh pendaftar syarikat. Dengan itu, tiada terdapat kemungkiran fasal 18 perjanjian utama itu.

(2) Notis tersebut tidak lengkap kerana butiran yang dikemukakan itu adalah tidak khusus, taksa dan kabur. Dakwaan bahawa perayu telah menyerahhak haknya di bawah perjanjian utama itu kepada pihak ketiga 'beberapa kali' tidak mempunyai butiran yang terperinci mengenai identiti pihak ketiga tersebut. Dakwaan itu perlu diperincikan dengan mencukupi untuk membolehkan perayu mengakui atau menafikannya. Notis yang begitu kabur tidak merupakan suatu notis di sisi undang-undang.

(3) Tidak terdapat peruntukan di dalam perjanjian utama itu yang memerlukan pihak-pihak supaya memaklumkan kepada Menteri Besar tentang kemajuan aktiviti pembalakan tersebut. Dengan itu, sebarang salah nyata kepada Menteri Besar oleh mana-mana pihak tidak memberi hak kepada pihak yang satu lagi untuk menamatkan perjanjian utama itu. Bagaimanapun, tidak terdapat bukti salah nyata tersebut oleh perayu kepada Menteri Besar dan notis tersebut tidak menjelaskan bagaimana salah nyata itu berlaku atau apa yang telah disalah nyatakan itu.

(4) Di bawah perjanjian kedua itu, perayu telah menggaji Kempadang untuk menebang kayu balak mengikut arahannya dan deposit jaminan di bawah perjanjian utama itu masih berada di bawah nama perayu, menandakan bahawa pembalakan itu masih diteruskan di bawah perjanjian utama itu. Lebih-lebih lagi, melalui fasal 12 perjanjian kedua itu, perjanjian kedua itu akan terus hidup selagi perjanjian utama itu masih berkuatkuasa. Ini menunjukkan bahawa perjanjian kedua itu bukan satu penyerahhakan tetapi adalah suatu subkontrak. Dengan itu, ia tidak memungkiri fasal 18.

Notes

For cases on assignment of contracts, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1153–1174.

For cases on termination of contracts, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2191–2195.

Cases referred to

Gregory v Serle [1898] 1 Ch 652 (refd)

Malayan Banking Bhd v PK Rajamani [1994] 1 MLJ 405 (folld)

Minister of Resource Planning & Ors v Keruntum Sdn Bhd [1988] 2 MLJ 226 (refd)

Sinha Govindji v Deputy Chief Controller of Imports and Exports, Madras & Ors [1962] 1 SCJ 93 (refd)

State of Uttar Pradesh v Salig Ram Sharma AIR 1960 All 543 (refd)

United General Insurance v Progress Credit Sdn Bhd [1988] 2 MLJ 297 (refd)

Legislation referred to

Companies Act 1965 s 23(6)

National Forestry Act 1984 s 21

Imports (Control) Order 1955 [Ind]

Appeal from: Civil Suit No 21–2–89 (High Court, Kota Bharu)

KS Narayanan (*Muhammad Shafee Abdullah* and *CG Oh* with him) (*Shafee & Co*) for the appellant.

Mathi Nayagam (*Wan Haron bin Wan Hassan* with him) (*Wan Haron, Sukri & Nordin*) for the respondent.

Lamin FCJ (delivering the grounds of judgment of the court): The appellant/plaintiff and the respondent/defendant entered into an agreement dated 24 December 1981 (hereinafter referred to as 'the main agreement') whereby the appellant/plaintiff, formerly known as Perkayuan OTP Sdn Bhd and referred to in the agreement as 'the logger' was given the rights and privileges to carry out logging in a timber concession of approximately 40,000 acres of forest land in the area situated in the Daerah of Nanggiri in the Jajahan Ulu Kelantan. The timber expected to be felled, logged and removed shall be of all usable tree species and subject to such conditions as imposed by the Director of Forestry, Kelantan or his agent as specified in the licence. This main agreement stipulates the date on which the appellant/plaintiff was to commence logging operations and the various payments it has to make to the Government of Kelantan in the form of royalty and premiums. It has also to pay the respondents a tribute on all timber felled and extracted from the concession area at the rate of RM15 per ton or 10% of the prevailing average quarterly timber price per ton.

By another agreement dated 24 May 1988 entered into between the appellant/plaintiff and Sykt Kempadang Bersatu Sdn Bhd (hereinafter

A referred to as 'the second agreement' otherwise 'the Kempadang agreement'), the appellant/plaintiff engaged the Sykt Kempadang Bersatu Sdn Bhd as a contractor 'to fell logs and remove timber from the contract area' subject to the terms and conditions therein contained.

By a letter of 26 October 1988, solicitors for the respondent/defendant B served a notice alleging that the appellant/plaintiff had committed breaches of the main agreement, namely:

(i) That you OTP Sdn Bhd did assign and/or transfer the main agreement and/or your rights therein to OKS No 2 Sdn Bhd without the written consent of KSEDC in breach of cl 18 of the main agreement.

C (ii) That you OTP Sdn Bhd and/or OKS No 2 Sdn Bhd have on various occasions assigned, leased, sub-let and/or transferred your rights under the main agreement to third parties without the written consent of KSEDC in breach of cl 18 of the main agreement.

(iii) That you OKS No 2 Sdn Bhd have misrepresented to YAB Datuk Menteri Besar, Kelantan vide your letter dated 28 September 1988 that D you entered into an agreement with Kempadang Bersatu Sdn Bhd of 1127A, Jalan Pengkalan Chepa, 15400 Kota Bharu, Kelantan dated 3 April 1987 and that the agreement was cancelled vide statutory declaration of Rusli bin Bakar, a director of Kempadang Bersatu Sdn Bhd dated 18 March 1988.

(iv) That there is a subsisting agreement between OKS No 2 Sdn Bhd and E Sykt Kempadang Bersatu Sdn Bhd of No 61, Jalan Besar, 18300 Gua Musang, Kelantan dated 24 May 1988 giving away your rights under the main agreement to Sykt Kempadang Bersatu Sdn Bhd again without the written consent of KSEDC.

By that said notice, the appellant/plaintiff was required to remedy those F breaches of the terms of the main agreement within two weeks from the date of the receipt of the notice and upon failure to do so, the respondent/defendant would terminate the main agreement in compliance with cl 21 of the said agreement. For ease of reference, I repeat here the two relevant clauses of the main agreement which read:

G 18 The logger shall not assign, lease, sublet or transfer the whole or any part of its rights under this agreement to any company or to any other person or persons whomsoever without first obtaining the written consent of the corporation.

21 Without prejudice to any other remedies the corporation may have against the logger, the corporation shall have the right at any time by H giving notice in writing to the logger, to terminate this agreement forthwith upon the logger failing to remedy within two weeks of being required in writing so to do by the corporation any breach of terms and conditions contained in this agreement.

By its letter of 5 November 1988, the appellant/plaintiff through its solicitors I flatly denied all those allegations. As was apparent from its letter in reply dated 16 November 1988, the denial was not well received by the respondent/defendant and it commented that even its last complaint or allegation had not been addressed. So on its instruction, its solicitors sent

a notice dated 12 December 1988 to the appellant/plaintiff terminating the main agreement of 24 December 1981. A

We will now deal with all the allegations one after another.

Allegation (i)

We find no reason to depart from the finding of the learned judge below and in the face of s 23(6) of the Companies Act 1965 and the certificate of incorporation on change of name of company issued by the registrar of companies on 2 April 1985, cl 18 of the main agreement has become nugatory and irrelevant. The change in name therefore does not affect the entity of the company. B C

Allegation (ii)

The appellant/plaintiff took up the subject of notice which it contended as being inadequate on the ground that the particulars set out therein were unspecific, ambiguous and vague. The allegations must be sufficiently particularized so as to enable a party upon whom the notice is served whether to admit or to deny any or all of them. Such a vague notice is no notice in law. A number of authorities were cited before us. In the case of *State of Uttar Pradesh v Salig Ram Sharma* AIR 1960 All 543, the court dismissed the appeal against the order of SK Verma J below who quashed the order of dismissal made by the Inspector-General of Prisons, Uttar Pradesh against the respondent, an assistant jailor. The respondent was charged with altering certain entries in an indent pertaining to the quantity of iron sheets and that he did so 'with ulterior motives'. Dharan J said that that was 'much too vague' and went on to say: D E

> In our view it is not enough to charge a government servant with having done an act 'with ulterior motives'; he must be told what precisely is the motive attributed to him, otherwise he would not be in a position to rebut the accusation. F

The case of *Sinha Govindji v Deputy Chief Controller of Imports and Exports, Madras & Ors* [1962] 1 SCJ 93 concerned a notice served on the holder (the petitioner) of two import licences informing him that the Ministry of Commerce and Industry proposed to cancel the two licences in the exercise of its powers under cl 9 of the Imports (Control) Order 1955 but without specifying the grounds on which action was proposed to be taken. Clause 9 lays down at least four grounds by which an action to cancel an import licence may be taken. There was no response from the authority to the petitioner's initiatives seeking clarification as regards the grounds for its proposed action, and instead he received two orders from the Ministry cancelling the two licences. Also, the two orders themselves failed to state on what ground they were cancelled. It was quite obvious that there was no way for the petitioner to show cause why his licences ought not to be cancelled because there were no specific charges for him to answer. The notice was no notice as he was deprived of the opportunity of being heard. The Supreme Court also quashed the two cancellation orders for being bad. G H I

A In a similar situation in Malaysia, the rule of natural justice is also implied as is reflected in the decision of the Supreme Court in the case of *Minister of Resource Planning & Ors v Keruntum Sdn Bhd* [1988] 2 MLJ 226 where Salleh Abas LP (delivering the judgment of the court) said at p 231 col 2D–E):

B > But before making any such decision one way or the other, the principle of fairness and prudent administration requires him to inform the licensee that his licence would be cancelled unless he can show an acceptable reason why it should not be regarded as invalid and therefore cancelled.

To further illustrate the legal position against insufficient notice, learned C counsel for the appellant/plaintiff cited the English case of *Gregory v Serle* [1898] 1 Ch 652 where it was adjudged that a notice served by a lessor on his lessee merely informing the lessee that he had 'not kept the said premises well and sufficiently repaired, and the party and other walls thereof' was not sufficient as it did not direct the attention of the lessee to the particular breaches complained of so as to give him an opportunity of D remedying them before an action was brought against him. Also it was submitted that by merely parrotting the language of the contract, and in the present case it was cl 18 of the main agreement, without giving any facts or other particulars, it was therefore insufficient and inadequate. It was cited to us a text book authority from *Principles of Administrative Law* E by MP Jain and SN Jain (4th Ed, 1986) at pp 240–241 which reads:

> A notice must be adequate. A notice in barebones language of the statute, ie which merely repeats the statutory language without giving any facts and other particulars, is insufficient and inadequate. Further, the grounds given in the notice on which the action is proposed to be taken should be clear, specific and unambiguous. If these conditions are not satisfied the person F cannot be said to have a reasonable opportunity of being heard. Such a notice is no notice.

We agree that the 'various occasions' on which the appellant/plaintiff was alleged to have assigned and/or transferred its rights to third parties lacked details. The identity of the third parties to whom the rights were allegedly G assigned and/or transferred was not particularized.

We agree with the submission of the learned counsel for the appellant/plaintiff and accordingly allegation (ii) must fail.

Allegation (iii)

H We agree with the learned judge below that there is no merit in this allegation. Suffice for us to quote that part of his judgment which states:

> Looking through the main agreement I find no provision which envisages or requires either party to keep the Menteri Besar posted of any progress or development of the logging activities as carried out under the agreement. It I cannot therefore be disputed that any representation or for that matter any misrepresentation by a party to the Menteri Besar would not entitle the other party to any right of termination or treat it as a breach towards securing the termination of the main agreement, since it is a matter relatively foreign to what had been contemplated by both parties at the material time.

We must add that after reading the letter of 28 September 1988 addressed to YAB Menteri Besar, we find it difficult to accept that there is contained in it an element of misrepresentation. It states nothing but facts and the truth. It admits that there was an agreement entered into between Kempadang Bersatu Sdn Bhd (hereinafter referred to as 'Kempadang') and OKS No 2 on 3 April 1987 but subsequently terminated for reason of inability on the part of Kempadang to honour its side of the bargain and this is evidenced by the statutory declaration of 18 March 1988. In the notice of 26 October 1988 from the solicitors of the Kelantan State Economic Development Corp ('KSEDC'), there is not even the faintest suggestion as to how the misrepresentation came about or what in fact was being misrepresented. (See item 4 in the notice.) No more need be said.

Allegation (iv)

We observe that from the grounds of judgment, the learned judge below found that the agreement of 24 May 1988 entered into between the appellant/plaintiff and Kempadang was a grant of assignment by the appellant/plaintiff to Kempadang without adequate examination of the terms of the agreement. He merely said:

> If on reading the agreement the inevitable conclusion is that it in substance confers on Kempadang the rights and obligations of the assignee and on the plaintiffs the rights and obligations of the assignors then the agreement must be construed as an agreement to assign the plaintiffs' rights and obligations irrespective of whatever label that may have been given — see *Malayan Banking Bhd v PK Rajamani* Supreme Court Civil Appeal No 02–181–1992 (yet to be reported). Having considered the nature and substance of the said agreement I am of the view that it is a camouflage by the plaintiffs as not to be seen offending against the prohibition of assignment or transfer of their rights under the main agreement. Accordingly, I hold that the agreement is in fact a grant of assignment by the plaintiffs to Kempadang.

(Note: The case of *Malayan Banking Bhd v PK Rajamani* has now been reported in [1994] 1 MLJ 405.)

Upon examination of all the relevant provisions of the second agreement of 24 May 1988, we are compelled to depart from the finding of the learned judge below. From the preamble in paras (b) and (c), there is there stated the first indication as to the real intention of the parties. Because OKS No 2 (the appellant/plaintiff) 'is desirous of felling, logging and removing timber from that portion of the concession area', OKS No 2 'had agreed to engage' the contractor (Kempadang) to do the work subject to the terms and conditions in the agreement. The appellant/plaintiff agreed only 'to engage' Kempadang. To engage is to employ or to secure for service. By cl 1 of the said agreement, the contractor 'agrees to fell ...' the timber 'subject to the *reasonable* satisfaction of OKS No 2 and in conformity with all the *reasonable directions* and *requirements* of OKS No 2 and ...'. Upon being engaged to do the work, the contractor did not have a free hand to work the concession area. Kempadang not only must satisfy the appellant/plaintiff, it must also comply with all the directions

A and requirements issued by the appellant/plaintiff. To carry out the work with such conditions attached cannot be the result of an assignment. In any agreement of this kind, provisions as to indemnity there must be. (See cl 3(b).) By cl 8, the contractor is obliged to have the policies of insurance together with the receipts of premium paid ready at any reasonable time for inspection by the appellant/plaintiff. The appellant/plaintiff is entitled to terminate the 'employment of the contractor' if 'he fails to observe or perform and comply' with any of the provisions of this agreement or the main agreement (cl 10(ii)).

According to the learned judge below, the agreement makes no mention about payment of money to Kempadang for the services rendered by them as is normally expected in a contract for services. Under cl 6 of the second agreement, the contractor is entitled to sell all the timber that he fells and proceeds are to be distributed monthly. 10% of the proceeds is to be paid to the KSEDC as a tribute. The state government shall receive all royalties and premiums due. Out of the proceeds the contractor will also pay all 'other operational expenses'. Such expenses will certainly include the yearly payment for licence fees. (The term of a licence to extract timber is for 12 months under s 21 of the National Forestry Act 1984.) Under the main contract or agreement the appellant/plaintiff, being the logger, had to make similar payments. In return for the grant of rights and privileges to work the whole concession area under cl 2 of the main agreement, the logger 'shall pay' the KSEDC a tribute on all timber felled and extracted 'at the rate of RM15 (Ringgit fifteen only) per ton or 10% of the prevailing average quarterly timber price per ton' whichever is greater and it became due and owing monthly. By cl 6 of the second agreement, it became the responsibility of the contractor and no more that of the logger, for the contractor was then 'to pay *direct*' to the SEDC by way of tribute '10% of all the timber sold at prevailing local market price' (cl 6(2)). Similarly with regard to royalties and premiums, the logger was obliged to pay the state government by virtue of cll 10 and 11 of the main agreement. This responsibility shifted to the contractor as injuncted by cl 6(3) of the second agreement. At this point, we wish to note that it was the logger who paid the security deposit of RM80,000 to the SEDC as required by cl 1(2) of the main agreement which would be refunded to the logger at the expiry of the agreement. There is no mention of this in the second agreement. With the security deposit still remaining in the name of the logger, by implication therefore, the logging operations would continue to be in the name and, accordingly, the responsibility of the main agreement. The effect of cl 12 of the second agreement would be that the second agreement would continue to subsist for so long as the main agreement remained in force. Should the contractor commit a default under cl 10 of the second agreement, his 'employment' could summarily be terminated by the logger. In other words, while the second agreement ceases to be in force the main agreement will continue to operate. On the other hand, the moment the main agreement expires or is terminated, the second agreement ceases to operate. This is another indicator that the logging operations were sub-contracted to the contractor.

The contractor under the Kempadang agreement was to fell, extract and to sell the timber and was to make all the payments to both the corporation and the state government. In view of the absence of further direction in either of the two agreements as to how the balance of the proceeds for the month was to be disbursed, it would appear to us (but without deciding the point) that the remainder must be handed over to the logger. This would seem to be consistent with the second agreement being in the nature of a sub-contract. However, in a similar type of sub-contract, it is not unusual to spell out in the contract itself the arrangement or formula pertaining to the entitlement of the parties to the contract on the proceeds from the concession area. It would be no surprise that in the present case, some private arrangement had been agreed to with regard to the entitlement of the parties on the balance of the proceeds for in the logging business especially, it can safely be assumed that no services are rendered gratis. The question that we have to ascertain is in regard to the nature of the second agreement; whether it is an assignment or a sub-contract. Learned counsel for the appellant/plaintiff cited *Pollock & Mulla on Indian Contract and Specific Relief Acts* (10th Ed) in support of his contention as to what can be assigned and what cannot. At p 380 it states:

> Assignment of contracts — Broadly speaking, the benefit of a contract can be assigned, but not the burden, subject to the same exception of strictly personal contracts that has been mentioned as affecting the powers and duties of executors. The principles were thus stated by the Court of Appeal in England [per Collins MR in *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660 at p 668]:
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> > 'Neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to someone else; this can only be brought about by the consent of all three, and involves the release of the original debtor ... On the other hand, it is equally clear that the benefit of a contract can be assigned, and wherever the consideration has been executed and nothing more remains but to enforce the obligation against the party who has received the consideration, the right to enforce it can be assigned ...'

Under the second agreement, the contractor agreed to submit to the dictates of the logger (the appellant/plaintiff). For example, the contractor agreed to abide with 'all reasonable directions and requirements of' the appellant/plaintiff when felling and removing the timber and that they must be performed to the satisfaction of the appellant/plaintiff (cl 1). Clause 2 of the second agreement stipulates that the contractor 'shall be deemed to have notice of all the provisions of the main contract'. Of course, the main contract or agreement contains both the rights and liabilities of parties to the contract. Clause 2 is not to stay as a wallflower but to emphasize in particular the provisions relating to the burden or liabilities must be given serious attention by the contractor requiring proper compliance. This peremptory demand is further spelt out for example in cll 3, 6 and 10. Under cl 3(b), the contractor is required to

'observe, perform and comply with all the provisions of the main contract', etc. While cl 3(b) is the usual indemnity provision for breaches and non-observance by the contractor's servants and agents, cl 6 spells out the contractor's obligation to make all the necessary payments similarly required of the logger (appellant/plaintiff) under the main agreement. For failure 'to observe or perform and comply' with any of the provisions in either of the two agreements relating to the felling, logging and removing of timber, under cl 10, the contractor's employment or services may be terminated. To gather the true intention of parties in a contract or an agreement, every provision of the agreement must be examined. In the case before us, the learned judge below did say that in order to ascertain whether the agreement of 24 May 1988 was in effect a contract to appoint contractors or in reality a grant of assignment to Kempadang 'the court has to look to the substance rather than the words'. That was exactly the approach enunciated by the Supreme Court in *Malayan Banking Bhd v PK Rajamani* [1994] 1 MLJ 405 in order to determine the real issue before the court, namely, whether the facility given in the letter of 7 March 1986 was a 'new' facility or a continuing facility secured by the then existing charges. Having adopted that same approach, the learned judge below however immediately concluded that 'in substance' the Kempadang agreement conferred on Kempadang 'the rights and obligations' of the assignees and on the plaintiff the rights and obligations of the assignors and therefore the agreement must be construed as a grant of assignment by the plaintiffs to Kempadang without giving us the privilege of following his mental reasoning for coming to that conclusion. As we have said, we disagree with the learned judge's conclusion.

Now for an assignment under cl 18 of the main agreement to be effective, prior written consent must first be obtained from the corporation (the respondent/defendant): *United General Insurance v Progress Credit Sdn Bhd* [1988] 2 MLJ 297. The question that has been asked is whether the second agreement has breached the said cl 18. The short answer is no, it has not, for the reason that the second agreement is a sub-contract and not an assignment and that sub-contract is excluded from the terms of cl 18.

For the above reasons, we are therefore of the view that that allegation (iv) must also fail. This appeal accordingly must be allowed and we therefore allow the appeal on the following terms:

(a) As we have found that the notice of 12 December 1988 to terminate the main agreement was bad in law, therefore the termination was null and void and of no effect.

(b) In the amended statement of claim, it was alleged in para 10(vi), the Kempadang agreement of 24 May 1988 was never acted upon and no application for any logging licence was made for Kempadang to do logging. To this there was only a plain denial as a defence with no particulars provided. However on 5 September 1993, for the purpose of the disposal of this case, both parties agreed not to submit oral evidence. In the circumstances, the allegation in para 10(vi) in the amended statement of claim must stand. The main agreement refers

to a concession area of approximately 40,000 acres. But it is not disputed that 10,000 acres had already been cut by 1988 leaving an area of 30,000 acres which in fact is the total acreage for the concession area referred to in the Kempadang agreement of 24 May 1988. We therefore order the respondent/defendant to provide the appellant/plaintiff for logging the full remaining 30,000 acres of timber concession under the main agreement.

The appellant/plaintiff further alleged in its submission that there had been pilferage or illegal logging in the concession area of 30,000 acres despite the injunction obtained by the appellant/plaintiff on 8 January 1989 and therefore asked for a replacement. As it is not clear whether a survey has been made as to the amount of illegal logging involved, we therefore do not propose to make any order on replacement or even damages.

(c) Costs of the appeal.

(d) Deposit to be refunded to the appellant.

Appeal allowed.

Reported by Prof Ahmad Ibrahim